



**Town of Arlington
Legal Department**

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To: Community Preservation Act Committee
Cc: James Feeney, Deputy Town Manager
Date: December 1, 2021
Re: Considerations for Church Preservation Projects

Executive Summary

Members of the Community Preservation Act Committee (“CPAC”), I write at the request of the Chair to outline the process and criteria for evaluating CPA applications from houses of worship, more specifically, the application of the Covenant Church (Christian Life Fellowship, Inc) relative to the historic church located at 9 Westminster Avenue in Arlington. In brief, CPA funds (as well other forms of grants) can and have been expended on the preservation of many historic houses of worship throughout the Commonwealth, which are often central to the historic and cultural landscape of New England cities and towns. However, extra care must be exercised in the form of a three (3) factor test to avoid tipping into impermissible aid of religious institutions. Use of CPA funds for such purposes, as outlined further below, can be highly fact-specific. In the opinion of this Office, CPAC has sufficient information to proceed to its next round of examining the application before you if it is so inclined. However, both CPAC and the applicant are encouraged to examine the application for preservation and restoration of

with an eye towards offering the most community benefit with the least amount of entanglement in religious practice or uses, which may require further detail and/or modifications to the application.

The “Anti-Aid” Amendment

Article XVIII of the Amendments to the Massachusetts Constitution, Section 2 provides in relevant part as follows:¹

No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any . . . charitable or religious undertaking which is not publicly owned.

Subsequent analysis and interpretation by the Massachusetts Supreme Judicial Court, especially in the decisions of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) and *Caplan v. Town of Acton*, 479 Mass. 69 (2018) however confirmed that “maintaining” or “aiding” are relative terms, especially where the wider, secular public derives a benefit from use of government funds for a religiously-adjacent purpose. As articulated by the SJC in *Caplan*,

We do not interpret the Massachusetts anti-aid amendment to impose a categorical ban on the grant of public funds to a church ‘solely because it is a church.’ Rather, under our three-factor test, whether a church can receive such a grant depends on the grant’s purpose and effect, and the risk that its award might trigger the risks that prompted the passage of the anti-aid amendment.

Caplan v. Acton, 479 Mass. 69 at 84-85, 92. In affirming that there is not a categorical prohibition on use of CPA funds on historic preservation of houses of worship, the *Caplan* Court went so far to note that public funds could be used to provide a safer playground surface for a church preschool, provide state assistance for transportation to private schools, or to contract

¹ It may be helpful to the CPAC and public to briefly recite the context and history of the Amendment. In very short form, the Commonwealth’s original Declaration of Rights explicitly allowed aid to religious organizations, specifically for Protestant religious education. In the century that followed, legislators and leaders in the Commonwealth feared growing sectarian tension. Coupled with strong anti-immigrant and anti-Catholic sentiment, the “Know-Nothing Party” championed the 1855 Anti-Aid Amendment primarily as a means of maintaining control over school curriculum, which at such time featured Protestant religious instruction. In 1917, the Amendment was effectively replaced with its current iteration, which while improved on its face, remained deeply rooted in Catholic-Protestant tension rather than a spirit akin to the First Amendment to the United States Constitution.

with religious institutions providing a specific service in the public's interest. The individual facts and circumstances of each scenario are important to develop for the record and to define the parameters of a grant.

In the context presented here, the Court's interpretation is also consistent with several long-standing practices both with respect to CPA funds and other state and federal grant programs relative to houses of worship – grants may be awarded for the general purpose of historic preservation.² The most clear cut examples are those like the “Old North Church” in Boston, which is both a historic site supported by a variety of public and private funding sources, and an active house of worship.

Three-Factor Test for Examining and Refining CPA Applications

The three-factor” test for examining a grant to a religious institution looks to the following:

1. Purpose – grants that are ‘for the purposes of founding, maintaining or aiding a church will trigger additional scrutiny;
2. Substantiality – the primary effect of a grant should not be to “substantially aid” a church;
3. Risks - grants must avoid the risks of improper entanglement with houses of worship, threaten civic harmony or infringe “liberty of conscience.”

Caplan at 87-90.

Practically speaking, satisfying the test means that the CPAC should be able to make specific findings with respect to each of the foregoing. For example, an application for historic preservation of a house of worship should be supported by evidence of the house of worship's historical and architectural significance. A listing on the Town's inventory of historic properties and/or on the Massachusetts Cultural Resource Information System registry of historic properties is highly probative of the public value of investing funds in the preservation and/or restoration of a building used for religious purposes.

² In this vein, as early as 2007, the Department of Revenue confirmed that historic preservation of private property did not in its opinion violate the Anti-Aid Amendment.

Similarly, the CPAC should make findings with respect to the “substantiality” of its grants relative to a house of worship. Both the Applicant and CPAC should be able to articulate why the work to be performed with a CPAC grant is not substantial aid to a religious mission. A clear violation of Anti-Aid would be paying clergy salary, providing for vestments, or architectural work for the primary purpose of providing new confessionals. Unfortunately, such lines are often harder to draw in the context of historic preservation because the building itself is clearly a forum for religious activities. Turning back to the Old North Church example, the specific facts surrounding such a site, likely proffers specific reasons why its church pews or its crypt have historic significance to a broader audience than religious participants, but such evidence may not be as readily available in every instance involving a house of worship. In other contexts, preservation may be limited to exterior work, a church bell, or preservation of meeting space that once housed local town meetings.

Finally, with respect to risk of entanglement, similar findings should be made so as to ensure that the mission of the government (here CPAC) and the mission of a religious organization are not excessively intertwined. It is important to note that religious organizations and government have long held common areas of interest. The Anti-Aid Amendment should not be construed to prevent the government from working in areas of overlap such as services for persons in need. In the case of grant funds of this nature, CPAC is unlikely to intertwine or entangle itself with a church operation or religious activity beyond the scope of specific preservation or restoration. As such, the most likely concern to document is the treatment of religious iconography – restoration of stained-glass windows for example – which should be subject to substantial additional scrutiny.

9 Westminster Application

Applied to the application before the CPAC, a major goal of the project is a public safety concern (as contemplated by the SJC relative to a play service for a day care) relative to accessibility. Indeed, while the example pre-dates the *Caplan* decision, in 2010 the Town of Westford approved the use of CPA funds specifically for accessibility improvements in their historic First Parish Church (alongside funding for an archiving project in recognition of the historic role churches played in town history). In that matter, the Westford CPAC noted activities which were open to the wider public. Here, you are presented with a similarly historic building

and site, but it may be useful to further assess, and as appropriate, outline the public benefit of *both* preserving the architectural character of the facility while achieving greater accessibility *as well as other beneficial current and potential public uses of the space*. This may or may not include making the property available for public visitors engaging the building for non-religious purposes, as is the case for many, many churches, synagogues and temples with historic features.

If the CPAC is eventually inclined to fund a project, it may also wish to specifically note a prohibition on use of funds to restore religious imagery (unless such imagery or features has specific and articulable historic value). You may also wish to supplement your grant agreement with conditions that that guarantee future public access to a building, or other requirements that provide civic confidence that the preservation and restoration work may be appreciated by the wider community rather than the religious community of the Covenant Church alone.

Conclusion

It is the opinion of this Office that CPAC *may* (it is of course not required) advance the grant application for 9 Westminster Ave, contingent upon receiving adequate information to make findings consistent with the three-factor Anti-Aid Amendment analysis highlighted above. It may also be prudent for the applicant to consider supplementing their application with as much specific information as they would believe would ameliorate any Anti-Aid Amendment concerns the CPAC may have, including detailing a scope of work that either explicitly excludes expenditures on any religious iconography, or provides substantial evidence of the historic value of such iconography to merit funding in the face of additional scrutiny.

Should the Committee have further questions, I would be happy to provide further analysis.